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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1973

NO. A-984

JIMMIE L. WALTERS ..... *Petitioner*

vs.

STATE OF ARKANSAS ..... *Respondent*

CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Arkansas Supreme Court is reported at 255 Ark. 904, 503 S.W. 2d 895 and is reproduced as an appendix to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether the trial court erred in declaring a mistrial after having been informed that the jury could not reach a verdict.
2. Whether Petitioner's subsequent trial constituted double jeopardy in violation of the Fifth and Four-

teenth Amendments to the United States Constitution.

3. Whether petitioner was denied due process and a fair and impartial trial.

STATEMENT

Petitioner herein was charged with first degree murder in an information filed February 13, 1973 in the Circuit Court of Van Buren County, Arkansas.

After deliberating for an unspecified period of time the jury foreman reported to the trial court that the jury was hopelessly deadlocked. After expressing an intention to declare a mistrial the judge inquired of the jury as to the stage of their deliberations:

COURT:

> If the proposition had been voted on, what would have been the degree?

FOREMAN:

> About the least.

COURT:

> You mean you were hung up between involuntary manslaughter and not guilty?

FOREMAN:

> Yes, sir. (T. 7-A)

The Court declared a mistrial and petitioner was subsequently re-tried for first degree murder. At the second trial the jury brought in a verdict of guilty of second degree murder and punishment was fixed at five (5) years imprisonment.

ARGUMENT

I.

THE TRIAL COURT DID NOT ERR IN DECLARING A MISTRIAL.

Petitioner contends that the trial court should not have declared a mistrial at his first trial for murder, that there was no manifest necessity for that action, and that the mistrial was declared without petitioner's consent.

The simple fact is this: the mistrial was declared after the court was informed by the jury foreman that a verdict was impossible. (T. 7-A)

It is well settled that an exception to the double jeopardy prohibition exists where an unforeseeable circumstance forces a termination of the trial without verdict and that the inability of the jury to agree, after proper deliberation, is such a circumstance. *United States v. Perez*, 9 Wheat. 579, 6 L. Ed. 165; *Logan v. United States*, 144 U.S. 263, 12 S. Ct. 617, 36 L. Ed. 429; *Gori v. United States*, 367 U.S. 364, 81 S. Ct. 1523, 6 L. Ed. 2d 901; *Potter v. State*, 42 Ark. 29.

The record does not indicate how long the jury had deliberated but it is clear that the court was informed that the jury could not reach a verdict. It was properly within the trial judge's discretion to declare a mistrial.

The case of *U.S. v. Jorn*, 400 U.S. 470, 91 S. Ct. 547 (1971) is inapplicable to the case at bar. There a mistrial was declared to enable the government to better prepare its case.

The trial judge clearly indicated his intention to declare a mistrial before he addressed the jury concerning the substance of their deliberations. (T. 7-A) There is simply no evidence that the court's action was "arbitrary."

II.

PETITIONER'S CONVICTION DID NOT CONSTITUTE DOUBLE JEOPARDY.

Having demonstrated that the mistrial was within the court's discretion and was occasioned by the jury's inability to reach a verdict, Respondent would submit that a double jeopardy situation did not arise, relying on the previously cited cases. *Perez, supra*; *Logan, supra*; *Gori, supra.*

Petitioner argues that since the first jury indicated that no degree of criminal homicide higher than involuntary manslaughter was being considered, that a subsequent prosecution for first degree murder was barred since the first jury ". . . had already acquitted the petitioner of any offense higher than involuntary manslaughter. . ." (Petitioner's brief, p. 9). This statement ignores the fact that the first jury was unable to reach a verdict. It would obviously be absurd to allow jury deliberations which did not result in a verdict to influence subsequent proceedings.

For this reason the cited cases of *Green v. U.S.*, 355 U.S. 184, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957) and *Price v. Georgia*, 398 U.S. 323, 90 S. Ct. 1757 (1970) are inapplicable. Both of these cases involved new trials after successful *appeals* of jury *verdicts.*

III.

THE RECORD DOES NOT INDICATE THAT PETITIONER WAS DENIED A FAIR TRIAL OR THAT THE TRIAL COURT WAS "PREOCCUPIED" WITH AIDING THE PROSECUTION.

Petitioner contended on appeal that the trial court was preoccupied with obtaining a guilty verdict as evidenced by the court's failure to declare a mistrial in the second trial. The record indicates that the second jury never indicated that they could not reach a verdict and there is no indication that a mistrial would have been appropriate under the circumstances.

Respondent wishes to point out that the complaint concerning the admission into evidence of petitioner's statement to the police and the allegations of bias as evidenced by ". . . a hostile and improper admonishment of a witness. . ." are raised here for the first time and were neither presented to nor considered by the Arkansas Supreme Court. Respondent must deny the allegation that the issues were placed before the court below as alleged in petitioner's brief at pages 10 and 12.

This case was briefed and argued orally before the Arkansas Supreme Court. The issues raised on appeal are discussed in the opinion. Since the certiorari petition prays review of the lower court's opinion it is improper to attempt to raise issues therein for the first time.

However, respondent specifically denies that the record in this cause indicates bias on the part of the trial judge or denial of due process of law to petitioner.

CONCLUSION

The opinion of the Arkansas Supreme Court is clearly correct and conflicts with no federal statute or decision. It is therefore respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

JIM GUY TUCKER
Attorney General

ALSTON JENNINGS, JR.
Assistant Attorney General
STATE OF ARKANSAS
Justice Building
Little Rock, Arkansas 72201

Attorneys for Respondent